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September 30, 2008

EX PARTE PRESENTATION

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, D.C. 20554

Re: Ex Parte Presentation in MM Docket No 07-198, Review of the Commission's Program Access Rules and Examination of Programming Tying Arrangements; Implementation of the Cable Television Consumer Protection and Competition Act of 1992, MM Docket No. 07-29

Dear Ms. Dortch:

CenturyTel Broadband Services, LLC ("CenturyTel"), a wholly-owned subsidiary of CenturyTel, Inc., files this letter in support of the Commission imposing a ban on exclusive arrangements in the context of retransmission consent arrangements. As a small video operator, CenturyTel has no bargaining power in retransmission consent negotiations because it has so few subscribers. As such, it is particularly vulnerable to anticompetitive marketing practices of broadcasters which adversely impact consumers because they cannot receive the channels they want. Specifically, CenturyTel believes that broadcasters should not be able to force an exclusive arrangement on a Multichannel Video Programming Distributor ("MVPD") that has the effect of preventing it from being able to carry the over-the-air broadcasting station in a market. As explained more fully below, these anticompetitive practices violate retransmission law and rules as well as Commission policies promoting competition in the broader video marketplace. They also prevent viewers from having available a multiplicity of voices in a market.

The issues of anticompetitive practices by broadcasters and promotion of multiple voices in the broader video marketplace were raised in the Notice of Proposed Rulemaking adopted by the Commission in the above-captioned matter. *Implementation of the Cable Television Consumer Protection and Competition Act of 1992*, MB Docket No. 07-29, FCC 07-169, at ¶ 119-33 (rel. Oct. 1, 2007) ("*Notice*"). Among other things, the *Notice* sought comment on whether the Commission should ban a broadcaster's demand, in exchange for entering into a retransmission consent agreement with respect to a broadcast station, that an MVPD also agree to carry other programming of the broadcaster. *Id.* at

17863, ¶ 121. The FCC indicated that such a tying arrangement may violate Section 325(b)(3)(C) of the *Communications Act* and would be an example of a “take it or leave it” demand that has been found in the past to violate the Commission’s rule that requires broadcasters and MVPDs to bargain in good faith over retransmission arrangements. 47 C.F.R. § 76.65(b)(1)(iv).

CenturyTel has introduced an IPTV offering in Missouri. This offering provides customers with an alternative to existing cable TV operations or satellite direct-to-home distributors. CenturyTel’s Missouri operations have approximately 1100 subscribers, but CenturyTel hopes to substantially expand its market share over the next few years.

CenturyTel should make it clear at the outset that no carrier will insist on must carry rights for carriage on CenturyTel IPTV operations because the number of subscribers is so small, and they are located in rural and smaller communities. These consumers are therefore not viewed as particularly important to local broadcasters. As such, CenturyTel is often forced to pay exorbitant rates to be able to carry local over-the-air broadcasting stations that air the big four television network programming, ABC, CBS, Fox, and NBC. CenturyTel’s ability to carry the big four on its IPTV offering is critical to its ability to market video services because the vast majority of consumers want the ability to access the big four network programming over their video systems.

Given that almost all consumers demand to have a local television broadcast from the big four, it is simply not a choice for MVPDs to exclude these stations from their channel line-ups. CenturyTel is concerned that there are some broadcasters who are using this superior market power to the detriment of CenturyTel and its IPTV subscribers. These broadcasting stations are exercising their superior bargaining power with respect to their ability to exact excess profits for carriage of the big four network programming. The Commission itself noted a similar problem when it stated that satellite direct-to-home distributors were at a competitive advantage when they were unable to offer local programming. *Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming*, 13 FCC Rcd 1034, ¶ 58 (1998). The same anticompetitive effect occurs when other MVPDs are denied access to local signals.

As these local broadcasting stations begin offering additional channels for possible carriage on MVPD systems, CenturyTel is finding that broadcasters are engaging in unreasonable and anticompetitive marketing practices to gain carriage of these additional channels. Some of these additional channels may provide some value to MVPD subscribers. However, some carriers have used their superior bargaining power to effectively exclude other video channels from CenturyTel systems.

A case in point is the retransmission consent negotiations that have occurred between CenturyTel and JW Broadcasting, LLC, (“JW”) which owns television station KMIZ in Columbia, Missouri, the ABC affiliate, as well as KQFXLP in Jefferson City, Missouri, the Fox affiliate. JW has told us and other MVPDs that KMIZ is the number one rated television station in the Columbia, Missouri market. During negotiations with JW last fall, it demanded that in order to carry KMIZ and KQFXLP, CenturyTel must also carry its affiliated weather channel exclusively in the Columbia market. Therefore, this

mandate prohibits CenturyTel from carrying the weather channel that is an affiliate of broadcasting station KMOU, which is the NBC affiliate in the Columbia market and owned by the University of Missouri.

In these circumstances, CenturyTel is capable of carrying both weather channels, but the bottom line is that it needs to carry the JW network affiliate broadcasting stations (i.e., KMIZ and KQFXLP) as well as the KMOU network affiliate broadcasting station. The behavior of JW, however, is likely to prevent CenturyTel from carrying the broadcasting stations of both parties because JW is using retransmission consent agreements in order to wage a competitive battle between its weather channel and that of KOMU.

In furtherance of this anticompetitive scheme, JW has stated that it is nonnegotiable that CenturyTel may not carry KMIZ or KQFXLP on its IPTV offering unless CenturyTel enters into an exclusive arrangement to carry its weather channel. JW has stated that it demands the exclusivity to gain a competitive advantage over KMOU's affiliated weather channel. JW has also pointedly reminded us that CenturyTel may not import into the Columbia market distant signals of network affiliate programming over which JW has syndicated exclusivity rights in the Columbia market. At the point of this gun, CenturyTel signed a retransmission consent agreement with JW over carriage of KMIZ and KQFXLP, including the exclusivity clause regarding the weather channel. Such agreement was written to end in one year, and CenturyTel is now renegotiating retransmission rights with JW. During this round of negotiations, KMOU is also insisting that in order to carry KMOU, CenturyTel must also carry its affiliate weather channel. If CenturyTel does not agree to this arrangement, it will not be permitted to carry KMOU. CenturyTel is willing to carry both weather channels, but does not want to be placed at a severe competitive disadvantage vis-à-vis other MVPDs by not being able to carry KMIZ and KQFXLP as well as KMOU.

Thus, CenturyTel's small IPTV operations are stuck in the middle of this competitive battle over weather channels. JW's anticompetitive exclusivity arrangement must be stopped. It is harming consumers in Missouri because they would be unable to obtain KMIZ and KQFXLP as well as KMOU if the JW exclusivity clause is forced on CenturyTel. CenturyTel presumes that this same anticompetitive mandate is forced on other video systems in the area so the adverse impact is likely felt by a much broader consumer base than simply potential CenturyTel subscribers. The only alternative these consumers have is to watch the weather station channel of KMOU over the air, something which is not practical for some 70 percent of all consumers who receive video signals solely through wired systems or through satellite direct-to-home distribution. If the requirement is not forced on other MVPDs, then it produces a clear discrimination that also violates the Commission's rules.

This type of exclusivity arrangement violates Section 325(b)(3)(C) of the *Communications Act*. The Act "prohibits a television broadcast station that provides retransmission consent from demanding an exclusive contract for carriage or failing to negotiate in good faith" There is no question that JW's contract is an "exclusive" contract prohibited by this section because it provides that an MVPD may only carry KMIZ and KQFXLP if it does not carry competing weather channels.

Second, making a singular negotiating offer clearly violates the Commission's good faith bargaining rules. In particular, JW has made a "take it or leave it" demand that CenturyTel enter into the exclusive arrangement with respect to its weather channel and refused to consider alternatives. This is precisely the type of situation that was identified by the Commission in its *Good Faith Order* and was found to be a per se violation of the rules. *Implementation of the Satellite Home Viewer Improvement Act of 1999; Retransmission Consent Issues: Good Faith Negotiation and Exclusivity*, 15 FCC Rcd 5445, 5463-64, ¶ 43 (2000) ("*Good Faith Order*"). 47 C.F.R. § 76.65(b)(iv).

Third, the effect of this exclusivity arrangement is to prevent CenturyTel's IPTV operations from carrying another broadcasting station in the market, because KOMU will only grant retransmission rights if CenturyTel also carries its weather channel. Since it could not under the JW exclusivity clause, CenturyTel would not be able to carry KMOU. Although the JW agreement is focused on the exclusivity for the weather channel, its practical impact prevents carriage of a competing over-the-air broadcaster in violation of the Commission's good faith negotiation rules. Forcing a party to enter into a retransmission agreement that prevents carriage of a competitor's channels clearly violates the Commission's rules. *Id.*, § 76.65(b)(vi). An agreement which indirectly accomplishes the same result is also contrary to the stated policy and should be prohibited.

It is true that the Commission refused to impose a blanket rule against tie-ins previously. However, this situation is clearly distinguishable from the alleged situation that the Commission was facing in 2001. The Commission stated that it would not act on a general allegation that a broadcaster was tying the carriage of an analog signal with a digital signal. *Carriage of Digital Television Broadcast Signals*, 16 FCC Rcd 2598, 2613 (2001). The Commission expressed concern about these tie-ins, but indicated that it would need to evaluate a specific factual situation before reaching a conclusion. It committed to monitoring the situation to determine the impact of a tie-in on small cable systems. *Id.* CenturyTel would prefer that there were no tie-in arrangements by broadcasters and other programmers. Nevertheless, there is no doubt that the unreasonable and anticompetitive demand of JW for exclusivity for its weather channel goes far beyond the bare allegations the Commission faced in 2001.

Prohibiting this sort of exclusivity arrangement is clearly consistent with the First Amendment. The Commission would not be prohibiting or requiring any speech. Rather, it would simply be invalidating an exclusivity arrangement that prevented an MVPD from placing an additional video channel on its system. As such, the action would further speech and the interests of the First Amendment and has no impact on the right of the party seeking to enforce exclusivity to speak or not speak. *See Turner Broadcasting Sys., Inc. v. FCC*, 114 S Ct 2445, 2461-62 (1994).

Small cable TV operators and newer MVPDs, such as CenturyTel, are particularly vulnerable to these sorts of anticompetitive exclusivity mandates. They typically possess

no bargaining leverage because of the small number of subscribers that view their video systems. And it is precisely these systems which have to have access to the big four network programming in order to be competitive with big cable TV systems and satellite direct-to-home distributors. The Commission's policies to promote competition among broadcasters and MVPDs, and between each other in the broader video marketplace, and ensuring that there are a multiplicity of voices in the video field, would be promoted by adopting CenturyTel's proposal. CenturyTel urges the Commission to specifically address these types of exclusivity agreements in this rulemaking.

Sincerely,



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